**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

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| **STATE OF WASHINGTON,** | ) | **No. 27079-3-III** |
| **Respondent,** | ) | |
| | ) | **Division Three** |
| **v.** | ) | |
| | ) | |
| **EARL OWEN FLIPPO,** | ) | **UNPUBLISHED OPINION** |
| | ) | |
| **Appellant.** | ) | |
| | ) | |

Brown, J. — Earl Owen Flippo appeals his four convictions of first degree child molestation involving separate children. He contends the evidence was insufficient on one count; the trial court improperly commented in answering a jury inquiry; the unanimity instruction was insufficient; the trial court erred in admitting a police transcript of one child's interview; his constitutional right to remain silent was violated; and he did not properly get credit for time served. We reject each contention, and affirm.

FACTS

The facts are stated in the light most favorable to the State because of the

evidence insufficiency challenge. *See State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (stating the evidence insufficiency standard).

During 2005 and 2006, Mr. Flippo lived with his then-wife, Heather Mangini, and her children, including her son, B.M., and Kandy Homan and her children, including her daughters J.H. and T.H., in College Place, Washington. B.M., J.H., and T.H. later disclosed incidents of sexual contact by Mr. Flippo. A.C., a girl who was a friend of B.M., also disclosed an incident of sexual contact by Mr. Flippo.

The State charged Mr. Flippo with four counts of first degree child molestation involving J.H., T.H., B.M., and A.C.[1] Count 4 of the Second Amended Information, involving A.C., alleged that the incident occurred "between the 1st day of June, 2006 and [the] 31st day of December, 2006." Clerk's Papers (CP) at 46.

At trial, Ms. Homan testified she dated Mr. Flippo from 2004 to 2006, and lived with him, along with her children, at various stated times. The last place she lived with Mr. Flippo was in College Place, from December 2005 through March 2006. She related Ms. Mangini and two of her children lived with them in College Place.

J.H., 11 years old at trial, testified that Mr. Flippo molested her approximately 20 times; the last incident occurred while she was living with Mr. Flippo in College Place. J.H. testified that Mr. Flippo climbed on top of her, and touched her breasts and the area between her legs. When asked, "[d]id [Mr. Flippo] climb on top of you and touch

[1] The count involving A.C. also included an allegation that Mr. Flippo was armed with a deadly weapon, which the jury declined to find.

you with his hands every time that you say he molested you?", J.H. answered "No." 1 Report of Proceedings (RP) (Mar. 4, 2008) at 109. J.H. further testified that Mr. Flippo did something different at times, but she could not recall a specific incident.

T.H., nine years old at trial, testified Mr. Flippo "touched me in places I didn't like" between three and five times, including approximately three or four times while she lived with Mr. Flippo in College Place. 1 RP (Mar. 4, 2008) at 64-68. The first incident occurred while she was living with Mr. Flippo "on Cherry Street." *Id.* at 65. T.H. testified Mr. Flippo put his finger in her "private," and rubbed his "dick" on her and had her touch it. 1 RP (Mar. 4, 2008) at 66-68, 72-75.

B.M., 11 years old at trial, testified Mr. Flippo touched his penis three times. He testified each incident happened in a different place, and he remembered an incident happening in College Place. B.M. further testified he could not remember where the first and second incidents occurred, but the third incident occurred at the home of a friend of Mr. Flippo's. B.M. testified he remembered being interviewed by Union Gap Police Detective Alba Levesque. B.M. answered "No" when asked, on cross-examination, "do you remember talking to Detective Levesque and saying [Mr. Flippo] dragged you out of the bathroom into the bedroom and put his penis in your behind?" 1 RP (Mar. 5, 2008) at 168.

Detective Alba Levesque testified she interviewed B.M. on August 2, 2007 and taped the interview. She testified B.M. discussed specific incidents of sexual contact,

including the following:

> [B.M.] said that he was taking a shower. When he came out of the shower . . . [Mr. Flippo] came in, grabbed him by the hair, pulled him into [Mr. Flippo] and . . . [Ms. Mangini's] bedroom. He then touched him. He described it as his front private part. And then he said that [Mr. Flippo] also stuck his own front private part into his back private part.

1 RP (Mar. 5, 2008) at 187. Detective Levesque testified she had B.M.'s interview transcribed into a paper transcript. Mr. Flippo cross-examined Detective Levesque regarding B.M.'s statements during the interview. The State later sought to admit the interview transcript, as Exhibit No. 3, as a prior inconsistent statement, pursuant to ER 801(d)(1). After Mr. Flippo objected, the following colloquy occurred with the trial court:

> [The Court:] . . . . [W]e're in a very odd posture here . . . . [Defense counsel] brought up that the whole incident about the penis and behind [sic], but that's inconsistent with how [B.M.] testified. So it seemed to me that was important to you. You brought it up and went through it with the witness, and didn't he tell you this, and now he said no, and you were the one that brought that all up. So frankly, I'm a little surprised you don't want it in here so you can waive it. You certainly waived it with testimony. [Defense Counsel:] As they say, I'm of two minds of that and I'm withdrawing my objection, Your Honor.

1 RP (Mar. 5, 2008) at 235-36. The trial court then admitted Exhibit No. 3.

When the State asked how her investigation proceeded, Detective Levesque testified, "I was later asked, a couple of months later, by Detective Maidment from College Place, to attempt to contact [Mr. Flippo], to see if he was willing to talk to me, and he was not at that time." 1 RP (Mar. 5, 2008) at 189. Mr. Flippo moved for a mistrial, arguing a comment on the exercise of his Fifth Amendment right. The court

denied the motion, ruling instead that the challenged testimony would be stricken, and the jury would be instructed to disregard it. The court instructed the jury:

> I'm going to tell you that to the extent there was comment by the witness relating to [Mr. Flippo's] inability or desire not to meet with her, I'm going to ask that you disregard that testimony. I'm going to strike that testimony.

1 RP (Mar. 5, 2008) at 194-95.

A.C., nine years old at trial, testified that Mr. Flippo lived across the street from her, "a year ago." 1 RP (Mar. 4, 2008) at 91. A.C. testified that then Ms. Mangini and B.M. lived with Mr. Flippo, and possibly Ms. Mangini's daughter. A.C. further testified she was good friends with B.M., and that they played together approximately three times per week. She testified she spent the night at B.M.'s house twice. She further testified on one of these occasions, Mr. Flippo touched her "private." 1 RP (Mar. 4, 2008) at 93.

Tabitha Cruz, A.C.'s mother, testified she knew Mr. Flippo when her family was living in Walla Walla, confirming her family lived across the street from Mr. Flippo, and that Ms. Mangini, her daughter, and B.M. lived with him. When questioned about the dates of A.C.'s sleepovers at B.M.'s house, Ms. Cruz testified:

> [The State:] Do you know, do you remember when the first time was that [A.C.] spent the night?
> [Ms. Cruz:] No.
> [The State:] Okay. Do you remember when the last time was?
> [Ms. Cruz:] When they moved off of Chesnut.
> [The State:] Do you remember about what date that was?
> [Ms. Cruz:] No.
> [The State:] Do you remember what time of year?

> [Ms. Cruz:] It was summer.
> [The State:] Do you remember which year it was?
> [Ms. Cruz:] About a year-and-a-half, about a year-and-a-half-ago.
> [The State:] So that would have been '06 or so?
> [Ms. Cruz:] Um hmm.

1 RP (Mar. 4, 2008) at 81. Ms. Mangini testified A.C. "lived right across the street from us when we first moved here." 1 RP (Mar. 5, 2008) at 133. She testified she and Mr. Flippo lived in College Place, "in 2005 I think, 5 or 6." 1 RP (Mar. 5, 2008) at 131. She testified Ms. Homan moved from their residence in College Place in approximately March 2006, because they had moved out of the house in College Place. When asked about the time frame of B.M. and A.C.'s friendship, Ms. Mangini testified:

> [The State:] How long did [A.C.] and [B.M.] remain friends?
> [Ms. Mangini:] The entire time. They're still friends.
> [The State:] Was this before or after you moved to College Place?
> [Ms. Mangini:] Before.
> [The State:] How did they maintain contact when you moved to College Place?
> [Ms. Mangini:] [B.M.] was still going to school in Walla Walla. And me and [Ms. Cruz] still talked. I would take him over to [Ms. Cruz's] house to play. And on occasion [Ms. Cruz] would come over to our house.

1 RP (Mar. 5, 2008) at 133-34. Ms. Mangini testified the last time A.C. was at their house was a year and a half ago.

Walla Walla Police Detective Tracy Klem interviewed A.C. He testified the incident "was reported to have occurred at some apartments at Second and Chesnut in Walla Walla." 1 RP (Mar. 5, 2008) at 226.

Mr. Flippo testified. He denied improperly touching J.H., T.H., B.M., and A.C.

The trial court partly instructed the jury in order to convict Mr. Flippo of first degree child molestation of J.H., T.H., and B.M., it had to find the following element was proven beyond a reasonable doubt: "[t]hat between the 1st day of December, 2005 and the 31st day of March, 2006, the defendant engaged in sexual contact" with J.H., T.H., and B.M. CP at 60-62.

In Jury Instruction No. 9, the trial court partly instructed the jury in order to convict Mr. Flippo of first degree child molestation of A.C., it had to find the following element was proven beyond a reasonable doubt: "[t]hat between the 1st day of June, 2006, and the 31st day of December, 2006, [Mr. Flippo] engaged in sexual contact with [A.C.]." CP at 63. Mr. Flippo did not object. During deliberations, the jury submitted the following inquiry to the trial court:

> Instruction No. 9 appears to have an incorrect date[.] [T]he amended dates are June, 2006 to December 31, 2006. But we think that all the parties involved had moved out by mid-2006. We think the date should be June, 2005, or something different.

CP at 50. After a discussion with the State and defense counsel, the trial court submitted the following response to the jury: "Instruction #9 is correct as written. The dates, June 1, 2006 to Dec. 31, 2006, are the dates which have been charged in the information." CP at 50.

In Jury Instruction No. 11, the trial court instructed:

> There are allegations that [Mr. Flippo] committed acts of sexual contact and/or intercourse with the victim on multiple occasions. To convict [Mr. Flippo], one or more particular acts must be proved beyond a reasonable doubt and you must unanimously agree as to which act or acts have been proved beyond a

> reasonable doubt. You need not unanimously agree that all the acts have been proved beyond a reasonable doubt.

CP at 65. Defense counsel did not object to this instruction.

The jury found Mr. Flippo guilty as charged. At the April 21, 2008 sentencing, the court sentenced Mr. Flippo on each of four counts of first degree child molestation to a minimum term of 149 to 198 months and a maximum term of life. The court gave Mr. Flippo credit for 107 days served, after Sergeant Hall informed the court "[h]e has credit for 107 days." RP (Apr. 21, 2008) at 312. Defense counsel did not object, but did explain Mr. Flippo had indicated to him that he had been in custody since December 22. The record does not show how the 107 days was calculated. Mr. Flippo appealed.

## ANALYSIS

### A. Evidence Sufficiency, Count 4 - A.C.

The issue is whether sufficient evidence established A.C.'s molestation during the charging period, between June 1, 2006 and December 31, 2006.

When reviewing evidence sufficiency, "the court must view the evidence in the light most favorable to the State and decide whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt." *State v. Mines*, 163 Wn.2d 387, 391, 179 P.3d 835 (2008) (citing *State v. Luther*, 157 Wn.2d 63, 77, 134 P.3d 205 (2006)). A challenge to evidence sufficiency for a criminal conviction admits

the truth of the State's evidence and all inferences that can be reasonably drawn therefrom. *Salinas*, 119 Wn.2d at 201 (citing *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980)). Further, we draw all reasonable inferences from the evidence in favor of the State and interpret them most strongly against the defendant. *Salinas*, 119 Wn.2d at 201 (citing *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)). "Credibility determinations are for the trier of fact and are not subject to review." *Mines*, 163 Wn.2d at 391.

In Jury Instruction No. 9, the trial court partly instructed the jury in order to convict Mr. Flippo of first degree child molestation of A.C., it had to find the following element was proven beyond a reasonable doubt: "[t]hat between the 1st day of June, 2006, and the 31st day of December, 2006, [Mr. Flippo] engaged in sexual contact with [A.C.]." CP at 63. The parties did not object. Thus, under the law of the case doctrine, the State had to prove this element beyond a reasonable doubt. *See State v. Hickman*, 135 Wn.2d 97, 99, 954 P.2d 900 (1998) (holding that "elements in the 'to convict' instruction not objected to become the 'law of the case' which the State must prove beyond a reasonable doubt to prevail").

A.C. testified she spent the night at B.M.'s house twice, and on one of these occasions, Mr. Flippo touched her "private." 1 RP (Mar. 4, 2008) at 91. She did not testify regarding when or where this occurred, only that Mr. Flippo lived across the street from her "a year ago." 1 RP (Mar. 4, 2008) at 91. Ms. Cruz testified the last

time A.C. spent the night at B.M.'s house was "[w]hen they moved off of Chesnut." 1 RP (Mar. 4, 2008) at 81. Ms. Cruz could not remember the date, but she testified it was in the summer "[a]bout a year-and-a-half ago," which she confirmed "would have been '06 or so." 1 RP (Mar. 4, 2008) at 81. Ms. Mangini testified the last time A.C. was at their house was a year and a half ago.

Viewing this evidence in the light most favorable to the State, a rational trier of fact could have concluded beyond a reasonable doubt that Mr. Flippo molested A.C. between June 1, 2006 and December 31, 2006. A.C. testified Mr. Flippo touched her during one of two sleepovers at B.M.'s house. Ms. Cruz testified the last sleepover occurred a year and a half ago, which would have been, approximately, October 2006. Ms. Mangini also testified the last time A.C. was at their house was a year and a half ago. Further, Ms. Cruz testified the last sleepover was in the summer of 2006.

Mr. Flippo argues other testimony is conflicting, but the jury decides what weight is given to admissible testimony. *See Mines*, 163 Wn.2d at 391. Accordingly, given the testimony of Ms. Cruz, and Ms. Mangini, sufficient evidence established A.C.'s molestation during the charging period.

B. Comment on the Evidence

For the first time on appeal, Mr. Flippo contends the trial court's response to the jury inquiry concerning Jury Instruction No. 9 was an impermissible judicial comment on the evidence, violating article 4, section 16 of the Washington Constitution. This

involves a manifest constitutional error that we will consider for the first time on appeal. *State v. Levy,* 156 Wn.2d 709, 719-20, 132 P.3d 1076 (2006).

Under article 4, section 16 of the Washington Constitution, "[j]udges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." This provision prohibits a judge from "'conveying to the jury his or her personal attitudes toward the merits of the case' or instructing a jury that 'matters of fact have been established as a matter of law.'" *State v. Jackman*, 156 Wn.2d 736, 743-44, 132 P.3d 136 (2006) (quoting *State v. Becker,* 132 Wn.2d 54, 64, 935 P.2d 1321 (1997)). The purpose of this provision "is to prevent the jury from being unduly influenced by the court's opinion regarding the credibility, weight, or sufficiency of the evidence." *State v. Sivins,* 138 Wn. App. 52, 58, 155 P.3d 982 (2007) (citing *State v. Eisner,* 95 Wn.2d 458, 462, 626 P.2d 10 (1981)). We look to the case facts and circumstances to see if an improper comment has been made. *State v. Jacobsen,* 78 Wn.2d 491, 495, 477 P.2d 1 (1970).

Here, the trial court responded to the jury's inquiry by informing it, "[i]nstruction #9 is correct as written. The dates, June 1, 2006 to Dec. 31, 2006, are the dates which have been charged in the [I]nformation." CP at 50. This response neither conveyed the court's personal attitudes toward the merits of the case, nor did it instruct the jury that an issue of fact was established as a matter of law. *See Jackman*, 156 Wn.2d at 743-44. In addition, the response did not address the evidence presented at trial. *See*

*Sivins*, 138 Wn. App. at 58. Rather, the court's response informed the jury that the instruction correctly stated the charging period at issue. Unlike *Jackman* cited by Mr. Flippo in support of his argument, our case does not involve the inclusion of a contested fact in a jury instruction. *See Jackman,* 156 Wn.2d at 742. Therefore, the trial court did not impermissibly comment on the evidence.

C. Unanimity Instruction

Mr. Flippo contends the trial court erred in failing to give a unanimity jury instruction regarding the first degree child molestation counts involving J.H., T.H., and B.M.

"To return a guilty verdict, the jury must unanimously agree that the defendant committed the charged crime." *State v. Fisher*, 165 Wn.2d 727, 755, 202 P.3d 937 (2009) (citing *State v. Petrich*, 101 Wn.2d 566, 569, 683 P.2d 173 (1984)). "Where multiple acts relate to one charge, the State must elect the act on which it relies to convict the defendant, or the trial court must provide a unanimity instruction – a *Petrich* instruction." *State v. Bobenhouse*, 2009 WL 2783435, at *5 (Wash. Sept. 3, 2009). "The failure to do so in multiple acts cases is constitutional error." *Id*.

Here, J.H., T.H., and B.M. all testified to multiple acts of sexual contact by Mr. Flippo, and only one count was charged for each child. However, the trial court, in Jury Instruction No. 11, gave a unanimity jury instruction:

> There are allegations that [Mr. Flippo] committed acts of sexual contact and/or intercourse with the victim on multiple occasions. To convict [Mr. Flippo], one or more particular acts must be proved beyond a

> reasonable doubt and you must unanimously agree as to which act or acts have been proved beyond a reasonable doubt. You need not unanimously agree that all the acts have been proved beyond a reasonable doubt.

CP at 65. Mr. Flippo does not challenge the sufficiency of this unanimity instruction or point out how it conflicts with controlling case law. Thus, his contention fails.

Recently, our Supreme Court upheld a unanimity instruction with the same general wording as the unanimity instruction given here. *See Fisher*, 165 Wn.2d at 755-56. There, the defendant was charged with four counts of second degree child molestation of his former stepdaughter. *Id*. at 733. The jury was instructed that in order to convict the defendant, it had to prove, beyond a reasonable doubt: "[t]hat on four separate days between January 1, 1997 and December 30, 1997, the defendant had sexual contact with [the victim]." *Id*. at 739. The jury was instructed:

> There are allegations that the defendant committed acts of Child Molestation on multiple occasions. To convict the defendant, one or more particular acts must be proved beyond a reasonable doubt and you must unanimously agree as to which act or acts have been proved beyond a reasonable doubt. You need not unanimously agree that all the acts have been proved beyond a reasonable doubt.

*Id*. The court reasoned "the unanimity instruction required the jury to unanimously agree on the specific act or acts that had been proved beyond a reasonable doubt," and "[t]he jurors were also instructed that convicting [the defendant] required them to find that sexual contact occurred on four separate days." *Id*. at 755-56.

Here, like in *Fisher*, the unanimity instruction required the jury to unanimously

agree on the act or acts that were proven beyond a reasonable doubt on each count of sexual contact with J.H., T.H., and B.M. in a specific time period. *See Fisher*, 165 Wn.2d at 755-56. The trial court did not err in giving the unanimity instruction.

D. Transcript Evidence

The issue is whether the trial court erred in admitting in evidence Exhibit No. 3, the transcript of B.M.'s interview with Detective Levesque. While Mr. Flippo initially objected, after engaging in a colloquy with the trial court, Mr. Flippo withdrew his objection. The State correctly argues the withdrawal waived any challenge to the admissibility of Exhibit No. 3 on appeal.

Mr. Flippo argues cross-examining Detective Levesque on Exhibit No. 3 is analogous to that of offering preemptive testimony, citing *State v. Vy Thang*, 145 Wn.2d 630, 41 P.3d 1159 (2002). He is wrong. There, our Supreme Court concluded the defendant was not foreclosed from seeking review of the admission of a prior offense, where the defendant introduced the evidence first. *Vy Thang*, 145 Wn.2d at 646-49. The court held "[a] defense lawyer who introduces preemptive testimony only after losing a battle to exclude it cannot be said to introduce the evidence voluntarily." *Id*. at 648. Here, in contrast, Mr. Flippo cross-examined Detective Levesque before Exhibit No. 3 was admitted and he withdrew his objection to the exhibit when it was offered.

Moreover, our case facts are consistent with cases where waiver has been found when defendants affirmatively withdrew their objections to the admissibility of evidence.

*See State v. Valladares*, 99 Wn.2d 663, 671-72, 664 P.2d 508 (1983); *State v. Rice*, 24 Wn. App. 562, 564-68, 603 P.2d 835 (1979). We agree with the State that under the circumstances presented here, Mr. Flippo waived any challenge to the admissibility of Exhibit No. 3. *See Valladares*, 99 Wn.2d at 672; *Rice*, 24 Wn. App. at 568.

Finally, we review a trial court's decision to admit evidence for an abuse of discretion. *State v. Hamlet*, 133 Wn.2d 314, 324, 944 P.2d 1026 (1997). Because the trial court was never asked to exercise its discretion to determine the admissibility of this evidence, we have nothing to review.

E. Mistrial Motion

The issue is whether the trial court erred in denying Mr. Flippo's mistrial motion made after Detective Levesque testified that he refused to speak with her.

We review a trial court's denial of a motion for a mistrial for an abuse of discretion. *State v. Rodriguez*, 146 Wn.2d 260, 269, 45 P.3d 541 (2002) (citing *State v. Hopson*, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989)). An abuse of discretion exists "only when no reasonable judge would have reached the same conclusion." *Id*. (internal quotation marks omitted) (quoting *Hopson*, 113 Wn.2d at 284). Trial courts should grant a mistrial only when defendants have been so prejudiced that nothing short of a new trial can insure a fair trial. *Id*. at 270. Further, a mistrial should be granted only when no other curative measures can be taken to ensure a fair trial. *State v. Russell*, 125 Wn.2d 24, 85, 882 P.2d 747 (1994).

A defendant's right to silence derives from the Fifth Amendment and article 1, section 9 of the Washington Constitution. *State v. Romero*, 113 Wn. App. 779, 786, 54 P.3d 1255 (2002) (citing *State v. Easter*, 130 Wn.2d 228, 238, 922 P.2d 1285 (1996)). Further, "[i]n Washington, a defendant's constitutional right to silence applies in both pre and post-arrest situations." *Id*. (citing *Easter*, 130 Wn.2d at 243). "The State may not use a defendant's constitutionally permitted silence as substantive evidence of guilt." *Id*. at 787. Additionally, "it is constitutional error for a police witness to testify that a defendant refused to speak to him or her." *Id*. at 790 (citing *Easter*, 120 Wn.2d at 241).

After the critical testimony, Mr. Flippo unsuccessfully moved for a mistrial. The trial court instructed the jury:

> I'm going to tell you that to the extent there was comment by the witness relating to [Mr. Flippo's] inability or desire not to meet with her, I'm going to ask that you disregard that testimony. I'm going to strike that testimony.

1 RP (Mar. 5, 2008) at 194-95. Although Detective Levesque improperly testified that Mr. Flippo refused to speak to her, by immediately striking the testimony and instructing the jury to disregard it, the court mitigated any prejudice. We generally presume that jurors will follow instructions to disregard improper evidence. *Russell*, 125 Wn.2d at 84. Under these circumstances, the trial court did not abuse its discretion in denying Mr. Flippo's motion for a mistrial.

F. Credit for Time Served

The issue is whether the trial court erred in limiting credit for time served to 107 days. Mr. Flippo contends he was in custody for 121 days, from December 22, 2007 to April 21, 2008, the date of sentencing.

"The sentencing court shall give the offender credit for all confinement time served before the sentencing if that confinement was solely in regard to the offense for which the offender is being sentenced." RCW 9.94A.505(6). This statute "simply represents the codification of the constitutional requirement that an offender is entitled to credit for time served prior to sentencing." *State v. Williams*, 59 Wn. App. 379, 382, 796 P.2d 1301 (1990).

Here, the trial court gave Mr. Flippo credit for 107 days served, after Sergeant Hall informed the court "[h]e has credit for 107 days." RP (Apr. 21, 2008) at 312. Mr. Flippo apparently told his attorney he had been in custody since December 22, and the attorney related this to the court, but no verifying information was given to the court or has been provided to us.

Without a further record, we have insufficient means to review Mr. Flippo's claimed error. *See State v. Bache*, 146 Wn. App. 897, 902-03, 193 P.3d 198 (2008) (the defendant must provide the record necessary for the appellate court to resolve his argument) (citing *State v. Meas*, 118 Wn. App. 297, 303 n.6, 75 P.3d 998 (2003)). If Mr. Flippo possesses information outside this record bearing on this issue, it is properly the subject of a personal restraint petition.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the

Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Brown, J.

WE CONCUR:

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Kulik, A.C.J.

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Korsmo, J.